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1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

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3 CMG Holdings Group as  
4 successor to XA The  
Experimental Agency, Inc.,

5 Plaintiff,

6 v.

15 Civ. 5814 (JPO)

7 Joseph Wagner, et al.,

8 Defendants.

Telephone Conference

9 -----x

New York, N.Y.

May 3, 2017

11:02 a.m.

11 Before:

12 HON. J. PAUL OETKEN,

13 District Judge

14 APPEARANCES  
15 (Via Telephone)

16 EATON & VAN WINKLE LLP

Attorneys for Plaintiff

17 BY: LAWRENCE A. STECKMAN, ESQ.

ADAM J. RADER, ESQ.

18 WINDELS, MARX, LANE AND MITTENDORF LLP

Attorneys for Defendants

19 BY: SCOTT R. MATTHEWS, ESQ.

20 JAMES PATRICK TRACY, ESQ.

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(Case called)

THE DEPUTY CLERK: Starting with plaintiff's counsel, can I have counsel state their appearances for the record, please.

MR. RADER: Adam J. Rader and Lawrence A. Steckman from Eaton and van Winkle on behalf of the plaintiffs.

THE DEPUTY CLERK: Thank you.

And for defendants?

MR. MATTHEWS: Scott R. Matthews and James Tracy from Windels, Marx, Lane and Mittendorf for all defendants.

THE COURT: Good morning, folks. This is Judge Oetken. Thanks for joining the call.

I scheduled this call as a result of the April 18<sup>th</sup> letter requesting a conference regarding a discovery issue from defense counsel and the response on April 21<sup>st</sup> from plaintiff's counsel. So I gather you are in the middle of discovery. How is discovery going?

MR. RADER: We're cooperating and identifying --

THE COURT: Who is speaking?

MR. RADER: I'm sorry. This is Adam J. Rader speaking. The parties are collaborating on identifying issues and are working to move to the next stage of the exchange of documents.

THE COURT: Mr. Rader -- oh, you haven't exchanged documents yet?

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1 MR. RADER: No, your Honor. This is Adam Rader  
2 speaking again.

3 THE COURT: Have you had settlement discussions?

4 MR. RADER: Again, this is Adam Rader speaking. No,  
5 your Honor, we have not yet had any substantive settlement  
6 discussions.

7 THE COURT: Okay. Mr. Rader, do you have equitable  
8 claims remaining in this case?

9 MR. RADER: Your Honor, I don't believe so. I know  
10 that there was a section in there but they haven't identified  
11 those claims, so I'm not certain what those claims are alleged  
12 to be.

13 THE COURT: Well, you had them, but I dismissed them.  
14 I mean, you had a whole count that --

15 MR. RADER: This is Adam Rader. I believe that is the  
16 case, sir.

17 THE COURT: So Mr. Matthews or Mr. Tracy, why is the  
18 unclean hands defense pertinent or why does it remain? Because  
19 that was a defense to the equitable claims, as I recall.

20 MR. MATTHEWS: Your Honor, this is Scott Matthews  
21 speaking. I believe that the claim of unjust enrichment  
22 remains in the action.

23 THE COURT: Yes, it does.

24 MR. MATTHEWS: And I believe that that is an equitable  
25 claim, and that's why we are seeking to interpose an

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1 affirmative defense of unclean hands as well to the claim for  
2 punitive damages.

3 THE COURT: Okay. I'm trying to remember. I think  
4 the unjust enrichment claim remains.

5 So why don't you respond, Mr. Tracy. Is that who was  
6 speaking?

7 MR. MATTHEWS: No, your Honor. This is Scott  
8 Matthews.

9 THE COURT: Oh, Mr. Matthews. Mr. Matthews, why don't  
10 you respond to the points made in plaintiff's counsel's letter  
11 of April 21<sup>st</sup>, specifically the argument that these  
12 categories don't sufficiently relate to conduct that is  
13 arguably directed at the parties, or sort of sufficiently tied  
14 to the transactions that form the basis of the claims in the  
15 case as opposed to kind of general misconduct type allegations.

16 MR. MATTHEWS: Thank you, your Honor. Again, this is  
17 Scott Matthews.

18 The plaintiff has alleged numerous wrongdoings by my  
19 client that range from unauthorized requests for payment and  
20 reimbursement of expenses that we submit are business expenses  
21 and not personal expenses to outright staff, equipment,  
22 furniture, services, etc. We deny each and every one of these  
23 claims. Each and every one of them will be shown to be without  
24 merit, but in prosecuting this action, the plaintiff has also  
25 published a solicitation for financing via this investor hub

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1 website and via a press release wherein the plaintiff stated  
2 that it was offering a new classic Series A preferred share so  
3 it will have a first priority payout, from any litigation  
4 settlement. The company stated that under the anticipated  
5 program, it would authorize a total of 4 million Series A  
6 preferred shares with a liquidation preference of 1 dollar per  
7 share, an annual dividend yield of 5 percent of perpetual time  
8 horizon, and that the purpose of this offering is to, quote,  
9 remove those shareholders that are most interested in the  
10 possible recovery from prior employees' alleged misconduct.

11 THE COURT: Right. Right. I saw that in your letter.  
12 I understand. I mean, I guess you could argue that that shows  
13 that -- well, it shows what it shows. It shows that they've  
14 issued some securities relating -- which would be focused on  
15 any benefit derived from this lawsuit. Maybe that's improper,  
16 maybe it's sketchy, I don't know, but how does that relate to  
17 the claims against your client?

18 MR. MATTHEWS: Well, what it is is that it shows that  
19 this lawsuit, we submit, is, in essence, a sham, designed  
20 solely to prop up the stock amount of CMG. XA is no longer an  
21 operating entity, as far as we can tell, and it has no  
22 revenues. The only thing that it has is this lawsuit, and CMG  
23 continually posts information on investor websites about how it  
24 is likely to recover monies in this website, claiming that --  
25 in this lawsuit, claiming that it's going to somehow achieve a

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1 \$20 million recovery. As part of that, we've alleged that  
2 Mr. Laken has made unauthorized trades and has traded in  
3 somebody else's name under this very stock, as well as other  
4 companies. It fits a pattern of unlawful conduct now directed  
5 at my clients and directed specifically to this litigation, and  
6 that's why we believe that we're entitled to say that  
7 Mr. Laken, who's the controlling owner and director, chairman,  
8 CEO of CMG, is not entitled to come to this court and ask for  
9 equitable relief when he has these bad acts himself ongoing.  
10 We believe that the cases that they cited in their letter are  
11 inapplicable. The *Cohen Lans v. Naseman* case, which this Court  
12 is aware of, had to do with a law firm suing a client for  
13 failure to make payment of legal fees, and the client alleged  
14 that the law firm had unclean hands because it failed to secure  
15 a settlement. Your Honor ruled that that was not the reason  
16 why the settlement didn't go forward and, in any event, it was  
17 not a proper defense to the claim. And I want to point out  
18 that that decision that they cite was a summary judgment  
19 decision that the court considered. Here we're just seeking  
20 discovery of information concerning trades conducted by  
21 Mr. Laken, statements made on this investor hub website that  
22 are purportedly anonymous but they would be party statements if  
23 Mr. Laken or someone otherwise affiliated with CMG is making  
24 them, and in order just to get to obtain information that could  
25 lead to discoverable admissible evidence. It's not a summary

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1 judgment motion, your Honor.

2 THE COURT: Right. I understand.

3 MR. MATTHEWS: Okay.

4 THE COURT: I can't remember -- have you signed a  
5 protective order in this case?

6 MR. MATTHEWS: Your Honor, this is Scott Matthews.  
7 We've negotiated a protective order. It has not been signed  
8 and submitted to the Court, but I believe we are prepared to do  
9 so.

10 THE COURT: Okay. Mr. Rader, or Mr. Steckman, would  
11 you like to respond.

12 MR. RADER: Yes, your Honor. This is Adam Rader.

13 The first point is, even with Mr. Matthews'  
14 explanation, it's very tenuous. I don't say it meets the  
15 standard of direct relationship to this litigation or even an  
16 attenuated relationship to this litigation. There's no  
17 allegation of any injury to the defendants. They're claiming  
18 that that somehow shows that the allegations should be  
19 discredited in this case. But the way to show that would be to  
20 answer and disprove the allegations. The standards are clear.  
21 In the *Bistricer* case that we cited, that was directly on point  
22 in that in that case, after a magistrate had ordered discovery,  
23 the court in the Eastern District overruled and denied  
24 discovery and struck an unclean hands defense because it wasn't  
25 directly related to the subject matter of the litigation.

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1 We've also cited cases where, when RICO was involved, as it is  
2 in this case, there's no unclean hands defense, even if there  
3 is a direct connection to the litigation, which in this case  
4 there isn't, so you don't have to reach that issue because the  
5 RICO claims have been held to be analogous to antitrust suits,  
6 where RICO claims and unclean hands defense cannot be raised,  
7 and the policy to deter conduct that forms the basis for RICO  
8 should not allow parties to come and point the finger at the  
9 other side.

10 In addition, although not connected to the litigation,  
11 the allegations that he's talking about of the statement of the  
12 sale of CMG stock that supports this litigation was just put  
13 out as a talking point, but there wasn't actually an issuance  
14 of any security in relation to that.

15 Other than that, your Honor, we rest on what we've  
16 submitted. Thank you.

17 THE COURT: Okay. Well, I take your point. I think  
18 the unclean hands defense I'm persuaded is still in the case  
19 because there is unjust enrichment. These matters could also  
20 potentially be pertinent to the course of conduct issues and  
21 certainly relevant to whether this is a sham lawsuit for some  
22 reason. I don't know. In any event, if this were a narrowly  
23 focused contract dispute, I think the proportionality principle  
24 in the federal rules would justify limitations of discovery for  
25 things like this. However, this is a broad-based, extremely



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1 broad-based RICO allegation with all sorts of claims involving  
2 all sorts of conduct, seeking \$20 million against a bunch of  
3 former employees, and given the breadth of that, I think it is  
4 discoverable. I think all of these categories are  
5 discoverable.

6 Treating the letters as a motion to compel by  
7 defendants, the motion is granted and the protective order is  
8 denied. That's my ruling.

9 Anything else?

10 MR. MATTHEWS: No, your Honor. Thank you very much.

11 MR. RADER: Thank you, your Honor.

12 THE COURT: Thank you. We're adjourned.

13 (Adjourned)  
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